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JOHN MERRIMAN,

Case No. DISM-03-0094

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

Respondent.

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Member. The hearing was held in the conference room at the Department of Transportation Maintenance Building, 1707 South C Street, Port Angeles, Washington, on November 16, 2004.

1.3 Nature of Appeal. This is an appeal from the disciplinary sanction of dismissal for neglect of duty, insubordination, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleges Appellant engaged in a verbal and physical confrontation with his supervisor.

II. FINDINGS OF FACT

2.1 Appellant John Merriman was a Correctional Officer 2 for the Department of Corrections. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on October 21, 2003.

2.2 Appellant began working as a Correctional Officer at Clallam Bay Corrections Center (CBCC) in 1994. Appellant's personnel file reflects one letter of reprimand for use of profanity and four letters of reprimand and one Employee Conduct Report related to failure to call or report to work.

2.3 By letter dated October 6, 2003, Superintendent Sandra Carter notified Appellant of his dismissal, effective October 21, 2003. Ms. Carter alleged that on March 24, 2003, Appellant aggressively sought out his supervisor and, after moving to a private room, began yelling, "Why are you always fucking with me?" Ms. Carter further alleged Appellant then hit his supervisor in the head with his right hand as his supervisor was backing away in an attempt to protect himself.

2.4 On March 24, 2003, Appellant reviewed his personnel file and became angry when he discovered an entry that caused him to believe his supervisor, Sergeant Richard Foulkes, had accessed his medical information. Appellant spoke to Correctional Officer 2 Candi Torneby-Kupers, who observed his angry and agitated demeanor, attempted to calm him down, and advised him to use the proper grievance process to address his concerns.

2.5 Appellant proceeded to locate Sergeant Foulkes, who was in the Control 1 area. Sergeant Foulkes noted Appellant was visibly angry and directed him to the strip room where they could talk in private. When Appellant and Sergeant Foulkes entered the strip room, Officers Richard Long

1 and Troy Atwell were in the room but exited to the adjacent visiting room. Appellant stood facing
2 Sergeant Foulkes and the Control 1 booth and was positioned toward the back of the room.
3 Sergeant Foulkes stood closer to the doorway they had just entered, and his back was to Control 1.
4

5 2.6 Sergeant Foulkes testified he tried to calm Appellant but Appellant's anger escalated as he
6 yelled and paced back and forth. Sergeant Foulkes stated Appellant then swung and hit him.
7 Appellant denies that he instigated the altercation and claimed it was his supervisor who assaulted
8 him, and that he acted in self-defense.
9

10 2.7 Correctional Officer Nancy Dauth, who was working in the Control 1 booth, credibly
11 testified she heard Appellant yell, "you're always fucking with me" and witnessed Appellant
12 initiate the fight as she looked out of the Control 1 window into the strip room. Additionally,
13 Officers Long and Atwell, who were still in the visiting room, heard Appellant yelling loudly, and
14 Officer Long intervened and separated Appellant from Sergeant Foulkes. Therefore, we find
15 Appellant was not acting in self-defense, but rather he was the aggressor.
16

17 2.8 Superintendent Carter, Appellant's appointing authority, reviewed the investigative reports
18 and additionally spoke with witnesses who might have been able to verify Appellant's self-defense
19 claim. Ms. Carter also reviewed Appellant's personnel file. On July 24, 2003, Ms. Carter held a
20 pre-termination meeting and provided Appellant an opportunity to submit any new information or
21 mitigating circumstances. Although Appellant did not believe his actions warranted termination, he
22 did not provide any new information that mitigated his behavior. In determining the level of
23 discipline, Ms. Carter considered the seriousness of Appellant's aggressive and combative behavior,
24 as well as his failure to follow policy and act in a professional and safe manner, and determined she
25 had no alternative other than termination.
26

2.9 DOC Policy Directive 850.125, Workplace Violence Prevention Program, states, in relevant part:

- I. The Department of Corrections is committed to providing a safe and secure work environment. Violence in the workplace which includes any verbal assault, threatening behavior, or physical assaults occurring in or arising from the workplace will not be tolerated.

DOC Policy Directive 800.010, Ethics, states, in relevant part:

- A. Employees are responsible for knowing and adhering to applicable ethics laws, policies and Policy Directive and for making choices that exemplify an adherence to high ethical standards.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues this case is about workplace violence because Appellant sought out and engaged his supervisor in a verbal and physical confrontation. Respondent asserts Appellant admitted to being angry with his supervisor, acknowledged using profanity, and admitted to hitting his supervisor. Respondent argues the evidence does not support Appellant's self-defense assertion and argues Appellant's volatile behavior should not be tolerated. Respondent argues Appellant's conduct was highly inappropriate of a correctional officer working in a correctional facility where safety is paramount.

3.2 Appellant asserts he candidly admitted he was angry with his supervisor based on his belief that his supervisor improperly accessed his medical file. Appellant argues his supervisor directed him to a private room to discuss the matter, directed others in the room to vacate, and initiated the assault. Appellant asserts his actions were a result of the attack on him and argues he was acting in self-defense. As a result, Appellant argues his actions do not warrant dismissal and argues his termination is extremely unfair and unreasonable.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995).

4.5 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.6 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

1
2 4.7 Respondent has proven by a preponderance of the credible evidence that Appellant became
3 increasingly angry toward his supervisor and engaged him in a verbal altercation that culminated in
4 a physical assault. Respondent has further proven Appellant's aggressive and violent behavior
5 violated DOC policies on workplace violence and ethics. Respondent has established Appellant
6 neglected his duty when he failed to conduct himself in a professional manner, and his actions
7 compromised the safety and security of the institution and rise to the level of gross misconduct.

8
9 4.8 Therefore, under the proven facts and circumstances, dismissal is appropriate, and the
10 appeal should be denied.

11 **V. ORDER**

12 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of John Merriman is denied.

13
14 DATED this _____ day of _____, 2005.

15
16 WASHINGTON STATE PERSONNEL APPEALS BOARD

17
18 _____
19 Walter T. Hubbard, Chair

20
21 _____
22 Gerald L. Morgen, Member